MICHAEL RODAK, JR., CLE

In The

Supreme Court of the United States

No. 73-233

A. E. SLAYTON, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

BERNELL ALLEN SPELLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANDREW P. MILLER
Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	
I. Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That The State Court Record In Guilty Pleas Must Affirmatively Demonstrate That A Criminal Has Been Advised Of The Maximum Penalty Imposable If The Plea Is Accepted By The Judge As Intelligent And Involuntary.	7
II. Did The United States Court Of Appeals For The Fourth Circuit Err In Reversing The Decision Of The United States District Court For The Eastern District Of Virginia On A Theory Of The Case That Had Not Previously Been Presented To Either The District Court Or To The State Courts And There Had Therefore Been No Affirmative Demonstration That The Habeas Corpus Petitioner Had Exhausted His Available State Court Remedies Under 28 U.S.C. § 2254(b) And (c).	9
CONCLUSION	10
CERTIFICATE OF SERVICE	10
APPENDIX	

TABLE OF CITATIONS

Page

Cases

Boykin v. Alabama, 395 U.S. 238 (1969) 8

Brady v. United States, 397 U.S. 747 (1970) 8

McMann v. Richardson, 397 U.S. 759 (1970) 8

Parker v. North Carolina, 397 U.S. 790 (1970) 8

Parker v. Ross, 470 F.2d 1092 (4th Cir. 1972) 8

Picard v. Connor, 404 U.S. 270 (1971) 9

Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972) 8

Other Authorities

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 (b) and (c) 2, 9

Section 16.1-176(b), Code of Virginia (1950), as amended 3, 8

Rule 11, Federal Rules of Criminal Procedure 8

In The

Supreme Court of the United States

No. .....

A. E. SLAYTON, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

BERNELL ALLEN SPELLER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

A. E. Slayton, Jr., Superintendent of the Virginia State Penitentiary, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on April 5, 1973, in the case of Bernell Allen Speller v. A. E. Slayton, Jr., Superintendent of the Virginia State Penitentiary. A Petition for Rehearing was filed on April 18, 1973 and that Petition for Rehearing was denied by order of the United States Court of Appeals for the Fourth Circuit dated May 7, 1973.

OPINIONS BELOW

The memorandum order of the United States District Court for the Eastern District of Virginia, Norfolk, Division, of June 19, 1972, is not reported, but is included herein as Appendix A (App. p. 1). The memorandum decision of the United States Court of Appeals for the Fourth Circuit dated April 5, 1973, is similarly unreported, but is included herein as Appendix B (App. p. 5). The order denying the Petition for Rehearing is also unreported and is included herein as Appendix C (App. p. 8).

JURISDICTION

The jurisdiction of this Court to issue the Writ of Certiorari in this case is grounded upon 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit err in holding that the State Court record in guilty pleas must affirmatively demonstrate that a criminal has been advised of the maximum penalty imposable if the plea is accepted by the judge as intelligent and involuntary?

2. Did the United States Court of Appeals for the Fourth Circuit err in reversing the decision of the United States District Court for the Eastern District of Virginia on a theory of the case that had not previously been presented to either the District Court or to the State courts and there had therefore been no affirmative demonstration that the habeas corpus petitioner had exhausted his available state court remedies under 28 U.S.C. § 2254(b) and (c)?

STATEMENT OF THE CASE

On March 8, 1969, an armed robbery was committed at a 7-11 Store located in the City of Chesapeake, Virginia, with the appellant and at least two other persons entering the store and participating in the armed robbery. The appellant was subsequently arrested, charged with the commission of the offense and interrogated after being fully advised of his rights. He thereafter gave a verbal statement to the police admitting his complicity in the offense and the statement was reduced to writing by one of the police officers and signed by the appellant. The appellant was initially proceeded against in the Juvenile and Domestic Relations Court and that Court waived jurisdiction to the Circuit Court of the City of Chesapeake, which Court likewise assumed jurisdiction to try the appellant as an adult after reviewing a report prepared by a probation officer pursuant to § 16.1-176(b) of the Code of Virginia (1950), as amended. The appellant was tried in the Circuit Court of the City of Chesapeake on November 6, 1969, on a plea of guilty and a full and complete inquiry was made into that plea by the Judge of the Circuit Court (Trial Tr. 6-12). The Court proceeded to hear evidence relative to the charge and thereafter found the appellant guilty of robbery and continued the matter for the preparation of a presentence report. That report was presented on February 9, 1970, and the appellant was sentenced to serve 25 years in the Virginia State Penitentiary (Sentencing Tr. 14).

The appellant thereafter executed a petition for a writ of habeas corpus on June 15, 1970, and this petition was filed in the Circuit Court of the City of Chesapeake. That petition asserted the following grounds in support of the appellant's allegation that he was being illegally detained:

> "A. I feel that my attorney mis-advised me in my plea status. He suggested that I plea guilty, because I

would be unable to prove by innonce [sic] to the Court and said that I would get probation since it was my first offense.

"B. I strongly feel that the amount of time I was given is to [sic] exstreme [sic] and surpasses that of the others that were involved in the alleged offense, which were tried for and on the same offense.

"C. Since I was a juvenile at the time of the alleged offense, I do not belive [sic] that, that was considered, as the charge of contributeing [sic] to the delinquency of a minor was not raised in juvenile or circuit court against the others.

"D. I do not belive [sic] that it was considered that adults can influence a minor to the point of temptation and also verbally force minors into situations or problems they can not avoid.

"F. I was not given neither was I offered reliable or dependable counseling from a qualified and reptuable [sic] counselor, or social worker that was provided by the court."

Counsel was subsequently appointed to represent petitioner in the State court on that petition but the matter was dismissed by order of the Court of August 18, 1970, without a plenary hearing being held.

The petitioner subsequently filed an additional petition for writ of habeas corpus in the Supreme Court of Virginia dated September 28, 1971, and his allegations in that petition are as follows:

"1. Petitioner was coerced by his counsel to plead guilty to the said charge of robbery. The lawer [sic] quoted these words 'I want you to go ahead and plead guilty, because I do not want to have the judge made at me, and we do not stand a chance of beating the case,' this is witness [sic] by mother and wife.

"2. Petitioner was interrogated and guestion [sic] before he was taken to the police station, and was never advised of his rights, until after he was in the precent [sic], and the petitioner was only a juvnile [sic] at the time of his arrest of the age of 17, the petitioner should have been advised of his rights.

"3. Petitioner at the time of his arrest has an I.Q. of 65, and is passive and easily misled by an older person, and it was inadmissible for the petitioner to intelligent [sic] and understandingly know the meaning of the word 'guilty' and the maximum for the said charge of robbery, the petition is ignorant, and unable to understand.

"d. Petitioner's counsel was ineffective, and did not give the and did not give him the proper protection that is warranted of him, and that he coerced the petitioner into pleading guilty because he did not want to make the court made at him, this is truly denying the petitioner his rights, and the federal court will intervene to protect this petitioner.

"e. The judge shall not accept a guilty plea without first advising the petitioner as to the nature of the charge, and that his plea is made voluntarily, with understanding of the naturre [sic] of the charge against him, and the consequances [sic] of the charge against him."

The petitioner in § 15 of the petition pointed out that all of these grounds had previously been presented to the Circuit Court of the City of Chesapeake. The Supreme Court of Virginia denied the petition for writ of habeas corpus of January 17, 1972, and that Court had previously denied and refused a writ of error to the earlier judgment of the Circuit Court of the City of Chesapeake denying the prior petition by order dated March 10, 1971.

This federal petition for a writ of habeas corpus ensued

and it was dated on February 7, 1972, and alleged the following:

> "Petitioner was coerced by his attorney to plead guilty to the said charge of robbery. The lawyer quoted these words; 'I want you to go ahead and plead guilty, because I do not want the Judge mad at me, and we do not stand a chance of beating the case.' This was witnessed by my wife and mother.
>
> "Petitioner was interrogated before he was taken to the police station and was not advised of his rights until the questioning. At the time of the arrest, the petitioner was a juvenile at the age of seventeen (17) years old.
>
> "Petitioner at the time of his arrest had an I.Q. of 65, was passive and easily misled by older persons. At that age it was natrual [sic] that he could have been unable to comprehend the seriousness of his guilty plea.
>
> "Petitioner's counsel was ineffective due to the fact that he did not properly advised [sic] the petitioner, because he did not want to risk hostility from the Court.
>
> "Petitioner contends that his plea was not made voluntarily."

This petition was denied by order of the United States District Court for the Eastern District of Virginia, Norfolk Division, by order of June 19, 1972, which extensively and exhaustively referred to the transcripts of the Circuit Court of the City of Chesapeake and discussed the allegations in some detail.

A notice of appeal to the judgment of the District Court was thereafter filed and the memorandum decision complained of was entered on April 5, 1973, without the case being briefed or argued before the panel. A petition for a rehearing was filed in the United States Court of Appeals for the Fourth Circuit on April 18, 1973, and that petition was denied by order of the panel dated May 7, 1973.

ARGUMENT

I.

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That The State Court Record In Guilty Pleas Must Affirmatively Demonstrate That A Criminal Has Been Advised Of The Maximum Penalty Imposable If The Plea Is Accepted By The Judge As Intelligent And Involuntary.

The panel of the United States Court of Appeals for the Fourth Circuit that issued the case determined that "the maximum term of imprisonment to which a defendant may be exposed upon a plea of guilty is clearly a 'consequence' of the plea, and if the record fails to affirmatively indicate that Speller was advised of the maximum penalty his plea cannot stand" (App. pp. 6-7). Initially, this determination clearly ignores the recitation contained in the order of the Circuit Court of the City of Chesapeake of November 6, 1969, in which the following statement is made by the Judge of that Court:

> "Whereupon the accused was arraigned and after private consultation with his said counsel, pleaded guilty to the indictment, which plea was tendered by the accused in person, and the court, having made inquiry and being of the opinion that the accused fully understood the nature and the effect of his plea and *of the penalties that may be imposed upon his conviction,* proceeded to hear and determine the case without the intervention of a jury as provided by law, and having heard the evidence and argument of counsel; doth find the accused guilty of Robbery as charged in the indictment." (Emphasis supplied.)

It should be remembered that Speller had initially been proceeded against in the Juvenile and Domestic Relations Court of the City of Chesapeake and the transcript indicated that at the time the trial judge made his extensive

inquiry into Speller's guilty plea he had before him a pretrial report prepared by the Probation Department of the Juvenile Court in accordance with § 16.1-176(b) of the Code of Virginia (1950), as amended.

It is also submitted that prior to the memorandum decision complained of below, there was no decision of the United States Court of Appeals for the Fourth Circuit or of this Court which specifically, affirmatively and explicitedly stated that a constitutionally essential part of the inquiry into a guilty plea was a discussion of the penalties that could be imposed. The Fourth Circuit Court of Appeals in *Wade* v. *Coiner*, 468 F.2d 1059 (4th Cir. 1972) and *Parker* v. *Ross*, 470 F.2d 1092 (4th Cir. 1972), had expressly rejected the contentions that advice regarding the consequences of a guilty plea need include a particular catechism or "boiler plate" enumeration of the rights waived or the consequences involved in a plea of guilty.

It is respectfully submitted that this is particularly true where the defendant has not waived counsel and the record of trial contains an extensive inquiry into the voluntariness and intelligence of the plea by the trial judge.

It is clear that Your Honors in the cases of *Brady* v. *United States*, 397 U.S. 747 (1970), *McMann* v. *Richardson*, 397 U.S. 759 (1970) and *Parker* v. *North Carolina*, 397 U.S. 790 (1970) sought to insulate convictions bottomed on guilty pleas from collateral attack once an inquiry had been made into the voluntariness and intelligence of that guilty plea. Your Honors further indicated in *Boykin* v. *Alabama*, 395 U.S. 238 (1969), that an inquiry must be made on the face of the record into the intelligence and voluntariness of a plea of guilty but Your Honors have never gone so far as to engraft the "rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure upon the states." Quite often, a trial judge's

acceptance of a guilty plea must necessarily be based somewhat subjectively upon his analysis of the defendant's state of mind at the time that the plea was proffered, and it is difficult for another court on collateral attack to reassess that determination on the basis of the cold pages of a transcript. Thus, it is respectfully submitted that the decision of the United States Court of Appeals for the Fourth Circuit in this case was erroneous and review should be granted by this Honorable Court of that determination.

II.

Did The United States Court Of Appeals For The Fourth Circuit Err In Reversing The Decision Of The United States District Court For The Eastern District Of Virginia On A Theory Of The Case That Had Not Previously Been Presented To Either The District Court Or To The State Courts And There Had Therefore Been No Affirmative Demonstration That The Habeas Corpus Petitioner Had Exhausted His Available State Court Remedies Under 28 U.S.C. § 2254(b) And (c).

In rendering its memorandum decision on April 5, 1973, the panel of the United States Court of Appeals for the Fourth Circuit stated that "since this precise allegation was not squarely presented to the district court, we feel that the state should be given an opportunity to attempt to show that Speller had knowledge of the possible sentence he could receive" (App. p. 7). The petitioner herein, A. E. Slayton, Jr., respectfully submits that the "precise allegation was not squarely presented" to the state courts as well although Speller obliquely referred to the sentence in his petition filed in the Supreme Court of Virginia. The State courts should be given the initial opportunity to consider the "precise allegation," especially in light of the new rule announced by the Fourth Circuit Court of Appeals (*Picard* v. *Connor,* 404 U.S. 270 (1971)).

CONCLUSION

For the reasons stated, it is respectfully submitted that the Writ of Certiorari should be granted, and the judgment in this case reversed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., an Assistant Attorney General of Virginia, counsel for the Superintendent of the Virginia State Penitentiary in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 3rd day of August, 1973, I mailed a copy of the foregoing petition for a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Bernell Allen Speller, No. 94380, Southside State Farm, State Farm, Virginia 23160, the petitioner herein.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

* * *

MEMORANDUM DECISION

Entered June 19, 1972

Petitioner, a state court prisoner, signed a petition for a writ of habeas corpus received by the Clerk of this Court, Norfolk, Virginia, February 14, 1972.

Order of February 14, 1972 called upon respondent to answer and answer was received March 8, 1972, and rebuttal was received from Petitioner March 16, 1972.

Petitioner was convicted after a plea of guilty and trial before the Judge of the Circuit Court of the City of Chesapeake, for the crime of robbery, on February 9, 1970. He was sentenced to a term of twenty-five (25) years in the state penitentiary.

There was no appeal of the original conviction.

In a state writ of habeas corpus petition, relief was denied August 18, 1970 and further denied upon appeal March 10, 1971.

In a subsequent petition for a writ of habeas corpus, filed in the Supreme Court of Appeals of Virginia, relief was denied January 17, 1972.

The records and testimony in the original transcript reveal that Petitioner, with two others, entered the Seven-Eleven store of Mr. James Lindsey Armstrong as he was closing up at 11:00 p.m. March 8, 1969. (T. 13) Petitioner and one of the others "stuck guns in my [his] sides," they being sawed off shot guns, the Petitioner having one of the guns. (T. 14) Petitioner admits being one of the three individuals but said he did not possess one of the guns. Armstrong was tied up and $1,155.00 was taken from the

safe. (T. 15, 16) Chesapeake Detective C. S. Griggs arrested Petitioner, advised him of his rights from a card, took him to headquarters, again advised him of his rights and Petitioner gave a verbal statement, written out by the officer. The specific rights were put into the trial transcript and are fully set forth. (T. 17-21) In the statement (T. 22, 23), Petitioner stated at one point, "That was when I throwed my gun in the ditch." He further said that he received about "$20.00, something like that" (T. 23), of the money taken.

Petitioner alleges, (1) he was coerced to plead guilty by his attorney; (2) that he was interrogated by police officers prior to being advised of his rights; (3) that he was denied effective assistance of counsel; (4) that his guilty plea was involuntary, and (5) that he was seventeen (17) years of age at the time of the offense.

In reference to the allegations, the trial court was very thorough relative to same and the transcript reveals that the Court, after Petitioner's plea of guilty (T. 6), noted that Petitioner was close to eighteen (18) years of age when the offense occurred. The Court had previously asked for a probation officer's pre-trial report to determine whether he should be tried as a juvenile or as an adult. The Court had reviewed the report, and ruled that he should be tried as an adult. (T. 6-9) Petitioner was asked if he had "had an opportunity to talk to Mr. Brown, the lawyer who was appointed by the Court, and fully discuss your case with him?" Petitioner answered, "Yes, Sir." (T. 9) The Court went further and, noting that said attorney did not represent Petitioner in the lower court, stated, "But you have had ample time to talk to him since that time?" Petitioner answered, "Yes, sir." and that the attorney had carefully gone over the case with him. (T. 9) The Court asked, "Are you satisfied with the way Mr. Brown, your Court-appointed

lawyer, has represented you?" and "Do you have any complaints to make about his conduct, or anybody else's—regarding this trial?" Petitioner answered, "No, Sir." (T. 10) The Court further asked Petitioner, "Have you discussed with your attorney the matter of a plea of guilty or not guilty? I noticed you entered a plea of guilty. You had discussed that with your lawyer before that time?" Petitioner responded, "Yes, Sir." (T. 11) The Court then inquired, "And did he tell you that the plea of guilty was admission of the crime and the only question was the matter of punishment? Did he tell you that?" Answer, "Yes, Sir." "—and you still want to enter a plea of guilty?" Answer, "Yes, Sir." (T. 11)

Petitioner's whole defense was an admission that he was present with the other two perpetuators of the holdup, but he didn't know it was to be a holdup. This was farfetched and unbelievable in light of the victim's testimony.

From even the few excerpts set forth above, it is clear that there is no merit in any of Petitioner's allegations. His guilty plea was voluntary, beyond any doubt, and he understood the nature and effect of such a plea. All questions, except those jurisdictional, cannot thus be raised collaterally in a federal habeas corpus petition. *McMann* v. *Richardson*, 397 U.S. 759, 90 S.Ct. 1441 (1970).

Relative to the ineffective assistance of counsel allegation, the 30-page trial transcript and the 14-page presentence transcript refute Petitioner's allegation. Jefferson B. Brown, court-appointed counsel efficiently handled the case. He was faced with a case where his client was apprehended within minutes after the offense, and a statement given by the Petitioner to the police, after twice being advised of his rights, at the scene and at police headquarters, where the statement was given. The statement, Commonwealth's Exhibit #2, was given "freely and voluntarily

without threat or promise from Detective Griggs or any member of the Chesapeake Police Department." (T. 22) It was given after he signed a comprehensive rights form, Commonwealth's Exhibit #1. Each was sworn to April 9, 1969 by Petitioner. An attorney, of course, may not fabricate facts for Petitioner's defense. The attorney's advice to Petitioner to plead guilty was certainly in the best interest of his client, under the circumstances. From the state writ of habeas corpus petition, in which relief was denied August 18, 1970, actually Petitioner is questioning the length of his sentence, under the circumstances. The sentence was within the limits set forth by statute.

There is no merit in Petitioner's Allegations.

It is Ordered:—

(1) That the petition is Denied and Dismissed.

(2) That Petitioner may appeal in forma pauperis from this *final order* by forwarding a *written* notice of appeal to the Clerk of the United States District Court, Room 307, Post Office Building, Norfolk, Virginia 23510, within thirty (30) days from the date of this final order. For the reasons above stated, the Court declines to issue a certificate of probable cause.

(3) Let the Clerk send copy of this Order to the Attorney General of Virginia, the Clerk of the Circuit Court of the City of Chesapeake, and to the Petitioner.

/s/ Richard B. Kellam
United States District Judge

* * *

APPENDIX B

* * *

MEMORANDUM DECISION

Entered April 5, 1973

At the July 1969 Term of the Circuit Court of the City of Chesapeake, Virginia, the grand jury returned an indictment charging the appellant, Bernell Allen Speller, with robbery. On November 6, 1969, Speller pleaded guilty to the indictment and sentencing was deferred pending the preparation of a presentence report. On February 9, 1970, Speller again appeared before the Court and he was sentenced to twenty-five years in the penitentiary.

After fully exhausting his state remedies, Speller filed his present habeas corpus petition in the district court and he complains in this petition that: (1) his attorney coerced him into pleading guilty; (2) he was not advised of his rights prior to being interrogated by the police; (3) he was denied the effective assistance of counsel; and (4) his guilty plea was not knowingly and understandingly made.

The transcript of Speller's plea discloses that the clerk read the indictment and Speller then indicated the he wished to plead guilty. After noting that Speller was a juvenile at the time of the offense, the court reviewed the pre-trial report prepared by the juvenile court and ruled that in view of Speller's age, maturity and experience he should be tried as an adult. The court during the guilty plea inquiry advised Speller of his right to a trial by jury, asked if he had had an opportunity to confer with his attorney, whether he had any witnesses and whether he was satisfied with his attorney. The court then accepted the plea and the commonwealth presented evidence which

showed that Speller committed the offense charged. There is nothing in the record, however, which indicates that Speller was ever advised of the possible sentence he could receive.

In *Boykin* v. *Alabama*, 395 U.S. 238 (1969), the Supreme Court held that it is plain error for a trial judge to accept a defendant's guilty plea without an affirmative showing that the plea was intelligently and voluntarily entered and that the defendant "has a full understanding of what the plea connotes and of its consequence." *Id* at 244. *See Smith* v. *Cox*, 435 F.2d 453, 457 (4th Cir., 1970). The rigid requirements of Rule 11 of the Federal Rules of Criminal Procedure are not applicable to the states by virtue of *Boykin*, and it is not necessary that the judge advise a defendant of the maximum possible sentence, so long as *the record affirmatively shows* that the defendant's attorney, the clerk, or some other reliable source informed him of the possible penalty. *See Brady* v. *United States*, 397 U.S. 742, 747 n.4 (1970); *Wade* v. *Coiner*, ... F.2d ..... (4th Cir., October 26, 1972); *Oaks* v. *Wainwright*, 445 F.2d 1062 (5th Cir., 1971).

In Virginia armed robbery was punishable by death, confinement in the penitentiary for life, or for any term not less than five years. Va. Code Ann. § 18.1-91 (1960 Repl. Vol.). In the present case the trial judge never advised Speller of the penalty for robery, and he never asked Speller whether he knew what the penalty for robbery was. Moreover, there is nothing in the record which even suggests that Speller was ever told by his attorney or knew from any other source what the maximum sentence was. The maximum term of imprisonment to which a defendant may be exposed upon a plea of guilty is clearly a "consequence" of the plea, and if the record fails to affirmatively indicate that Speller was advised of the maximum penalty his plea cannot

stand. *See Jones* v. *United States*, 440 F.2d 466, 468 (2nd Cir., 1971); *Wade* v. *Wainwright*, 420 F.2d 898, 900 (5th Cir., 1969); *Pilkington* v. *United States*, 315 F.2d 204, 208 (4th Cir., 1964).

However, since this precise allegation was not squarely presented to the district court, we feel the state should be given an opportunity to attempt to show that Speller had knowledge of the possible sentence he could receive. If the state is unable to point to anything in the record which shows that Speller had the requisite knowledge, then the writ should issue forthwith.

In view of our disposition of the claim we need not rule on Speller's other claims at the present time.

Accordingly, a certificate of probable cause to appeal is granted, the judgment of the district court is vacated, and the case is remanded for further procedings consistent with this opinion.

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

/s/ John D. Butzner, Jr.
United States Circuit Judge

/s/ Donald Russell
United States Circuit Judge

* * *

APPENDIX C

* * *

ORDER

Entered May 7, 1973

After careful consideration and with the concurrence of Judge Butzner and Judge Russell, appellee's petition for rehearing in this case is hereby denied.

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

* * *